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LAW OFFICES  
**KOTEEN & NAFTALIN**  
1150 CONNECTICUT AVENUE  
WASHINGTON, D.C. 20036

BERNARD KOTEEN  
ALAN Y. NAFTALIN  
RAINER K. KRAUS  
ARTHUR B. GOODKIND  
GEORGE Y. WHEELER  
HERBERT D. MILLER, JR.  
MARGOT SMILEY HUMPHREY  
PETER M. CONNOLLY  
M. ANNE SWANSON  
CHARLES R. NAFTALIN  
  
GREGORY C. STAPLE  
OF COUNSEL

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

TELEPHONE  
(202) 467-5700  
TELECOPY  
(202) 467-5915  
CABLE ADDRESS  
"KOBURT"

March 11, 1994

William F. Caton, Acting Secretary  
Federal Communications Commission  
1919 M Street, N. W.  
Washington, D. C. 20554

Dear Mr. Caton:

Transmitted herewith, on behalf of Telephone and Data Systems, Inc. and United States Cellular Corporation, parties to CC Docket Number 94-11, is their Motion for Continuance of All Procedural Dates Pending Action on Petition for Stay in that proceeding.

In the event there are any questions concerning this matter, please communicate with this office.

Very truly yours,



Herbert D. Miller, Jr.

enc.

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BEFORE THE  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D. C. 20554

MAR 11 1994

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

CC Docket Number  
94-11

IN RE APPLICATION OF

TELEPHONE AND DATA SYSTEMS, INC.

For facilities in the Domestic Public  
Cellular Telecommunications Service  
on Frequency Block B in Market 715,  
Wisconsin 8 (Vernon) Rural Service  
Area

TO: Honorable Joseph P. Gonzalez  
Administrative Law Judge

**MOTION FOR CONTINUANCE OF ALL PROCEDURAL DATES  
PENDING ACTION ON PETITION FOR STAY**

Telephone and Data Systems, Inc. (TDS) and United States Cellular Corporation (USCC), specified as parties by the *Memorandum Opinion and Order and Hearing Designation Order (HDO)* in this proceeding, file herewith, by their attorneys, their Motion for a Continuance of All Procedural Dates Pending Action on their contemporaneously filed Petition for Stay of Proceeding, a copy of which is attached hereto and incorporated herein by reference.

This proceeding is an outgrowth of the Commission's decision in *La Star Cellular Telephone Company*, 6 FCC Rcd 6860 (ALJ 1991), *aff'd* 7 FCC Rcd 3792 (1992), *appeal pending sub nom Telephone and Data Systems, Inc. et al v. FCC* (Case Number 92-1291). There, the FCC found that USCC was in control of La Star Cellular Telephone Company. TDS *et al* appealed from that decision on July 10, 1992, oral argument was held before the Court of Appeals for the District of Columbia Circuit on October 18, 1993, and a decision is expected in the very near future.

According to the *HDO*, this hearing is to proceed from the "factual background" that USCC controlled *La Star*, as the Commission found in *La Star*, and the allegations "that USCC misrepresented facts and lacked candor in the *La Star* proceeding" are to be viewed against that background (*HDO*, ¶ 15). The *HDO* continues, "Nelson [the President of USCC] and USCC had every incentive to suggest that USCC was not in control; thus, there is a strong reason to believe that any inconsistencies and misstatements by Nelson were intentional." (*Id.*, ¶ 33). As shown in the attached side by side comparison of the *HDO* with the *La Star* record (Attachment A hereto), the *HDO* proceeds on that basis to find testimonial inconsistencies which simply do not exist. Even if there had already been a clear affirmation of the Commission's *La Star* decision by the Court of Appeals, those inconsistencies and misstatements still would not exist. Indeed, if you take away the misunderstandings of the record established by the side by side comparison, and you do not rely on the Commission's appealed from control findings, there is no basis for a hearing here.

We have asked the Court of Appeals to take judicial notice of the *HDO* and to consider it in deciding how best to deal with our *La Star* appeal. By *Order* dated February 17, 1994, the Court granted our motion for judicial notice. It is very clear that if the Court of Appeals rejects the Commission's findings that USCC controlled *La Star*, as we have asked it to do, this hearing will have to be tried (if at all) against a very different "factual background" than the *HDO* contemplates; that the alleged incentives for USCC personnel to "suggest that USCC was not in control" will be seen to be very different from those attributed to them by the *HDO*; and that there will be no reason whatever to believe that "any inconsistencies and misstatements by Nelson were intentional" as the *HDO* suggests.

By the attached Petition for Stay of Proceeding, we have asked the Commission to give the Court of Appeals an opportunity to resolve the question presented by TDS' and USCC's appeal, *i.e.*, whether the Commission's findings that USCC was in control of La Star were contrary to the record, arbitrary, capricious and wrong, before permitting this proceeding to go forward. Because we have attached the Petition for Stay of Proceedings to the instant motion for the convenience of the Presiding Administrative Law Judge, we will not here repeat the arguments made in that Petition, beyond noting that there is a substantial likelihood that the Court will act in the very near future, and that it may well reverse the Commission's *La Star* control findings upon which the *HDO* is expressly predicated.

To conduct this hearing against the very "control background" which is now before the Court of Appeals and is therefore subject to change at any time would be inefficient, unfair, and unsound. Moreover, the decision to release the *HDO* before the Court of Appeals had acted was apparently driven by the Commission's desire to preserve an opportunity to impose a forfeiture under 47 U.S.C. § 503(b) (See *HDO*, ¶ 37). That purpose will not be undermined in any way by grant of this motion for a continuance. In light of the showing in the attached stay motion, the relatively short continuance of procedural dates here requested is reasonable<sup>1</sup>, and grant of this motion will allow the hearing to go forward (should that be appropriate in light of the Court's decision) on a consistent and rational course.

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<sup>1</sup> The only procedural dates thus far set are for the initial prehearing conference, scheduled to be held on March 15, 1994 and for the hearing itself to begin, on July 19, 1994.

In view of the above, it is respectfully requested that all procedural dates in the above captioned proceeding, including any related to discovery by any party, be continued pending Commission action on the attached Petition for Stay of Proceeding.

Respectfully submitted,  
TELEPHONE AND DATA SYSTEMS, INC.  
UNITED STATES CELLULAR CORPORATION

By

/s/

  
Alan Y. Naftalin  
Alan Y. Naftalin


By

/s/


  
Herbert D. Miller, Jr.  
Herbert D. Miller, Jr.

KOTEN & NAFTALIN  
SUITE 1000  
1150 CONNECTICUT AVENUE, N. W.  
WASHINGTON, D. C. 20036

/s/

  
R. Clark Wadlow  
R. Clark Wadlow

/s/

  
Mark D. Schneider  
Mark D. Schneider

SIDLEY & AUSTIN  
1722 EYE STREET, N.W.  
WASHINGTON, D. C. 20036

*Its attorneys*

March 11, 1994

**ATTACHMENT A**  
**SIDE BY SIDE COMPARISON OF HEARING DESIGNATION ORDER WITH THE**  
**RECORD IN *La Star***

## HEARING DESIGNATION ORDER

18. USCC president and member of the La Star Management Committee, Donald Nelson, in his written statement submitted as a part of La Star's direct case, swore that the Management Committee controlled the affairs of La Star. Specifically, Nelson testified: "Since my appointment to the management Committee in August, 1987, I have always acted on the belief that La Star's Management Committee is controlled by the three members appointed by SJI Cellular. I am not aware of a single instance where that has not been the case."<sup>30</sup> Nelson further states:

I conferred with the SJI Cellular members of the Management Committee only when a particular issue facing the venture required a joint effort to resolve. For example, when La Star was engaged in settlement negotiations with New Orleans CGSA, Inc. (NOCGSA), La Star needed to develop a settlement proposal to present to NOCGSA. Because of the wide variety of possible settlement options and the different perspective of the two venturers, a telephone conference was held. . . .

All participation by USCC in the activities of La Star was at the specific request of SJI Cellular or the Management Committee. . . .<sup>31</sup>

## ANALYSIS

¶18. The HDO asserts that Don Nelson swore in his direct case written testimony that the La Star "Management Committee controlled the affairs of La Star." He said nothing of the sort. The portion of Nelson's direct case testimony quoted immediately following that assertion,

"Since my appointment to the Management Committee in August, 1987, I have always acted on the belief that La Star's Management Committee is controlled by the three members appointed by SJI Cellular. I am not aware of a single instance where that has not been the case."

does not support the proposition for which the HDO cites it. Instead, it stands for the very different (and accurate) proposition that Nelson consistently acted on the belief that **SJI** controlled the **Management Committee**. As he also testified, the Management Committee as a formal entity had very little to do.

In further attempted support of the assertion that Nelson sought to portray the Management Committee as controlling the affairs of La Star, the HDO quotes selectively from other portions of Nelson's direct case testimony. Even the portions quoted in the HDO are not to the effect that the Management Committee was active in the day-to-day affairs of La Star. To the contrary, he states that he conferred with the SJI members only rarely. The quoted statement that "All participation by USCC in the activities of La Star was at the specific request of SJI Cellular or the Management Committee . . ." is incomplete by virtue of the omission of the rest of the sentence: "either directly or through La Star's counsel, or independent engineering consultant." (La Star Exhibit No. 15, p. 4).

Taken as a whole, Nelson's testimony was that La Star's activities had been litigious, that his primary contact had been with La Star's attorney, Arthur Benendiuk, not SJI members of the Management Committee, that the Management Committee had functioned only on an informal basis, and that he had contact with the SJI members of the Management Committee only rarely, when necessary. Nelson's direct testimony is quoted below. The portions omitted from the HDO quotations are in bold face type:

**"Although I am a member of La Star's Management Committee, I have not been actively involved in the day-to-day management of La Star's affairs, which, to my knowledge, have been litigious in nature. The Management Committee has five members. Three are appointed by SJI Cellular, Inc. ('SJI Cellular'). Two are appointed by Star, a wholly-owned subsidiary of USCC. Since my appointment to the Management Committee in August, 1987, I have always acted on the belief that La Star's Management Committee is controlled by the three members appointed by SJI Cellular. I am not aware of a single instance where that has not been the case."**

**Since August 1987, La Star's Management Committee has functioned on an informal basis. During the four years prior to USCC's acquisition of Star, La Star has been engaged in litigation for the right to file for and operate a cellular system in St. Tammany Parish. That litigation has continued, and my primary contact during the time I have been a member of La Star's Management Committee has been with La Star's attorney, Arthur V. Belendiuk. It is my understanding that Mr. Belendiuk has acted as independent counsel for La Star. He has never represented USCC, its parent company or any of its affiliates. To the best of my knowledge, he has never represented SJI Cellular, its parent company or any of its affiliates.**

**It is my understanding that La Star also has maintained an independent engineering consultant, Richard L. Biby. To the best of my knowledge, Mr. Biby has never served as a consultant to USCC, its parent company or any of its affiliates.**

**My usual contact regarding La Star matters was La Star's counsel, Mr. Belendiuk. Generally, I would receive a telephone call from Mr. Belendiuk**



and he would advise me of a need for La Star to take some action. Most of the calls involved a proposed course of action to be taken in the La Star litigation, e.g., the need to file an appeal. I understood that he had first spoken to someone at SJI Cellular and that the course of action had already been approved by SJI Cellular. In these circumstances, I did not believe that my approval was necessary, since three members of the Management Committee had already given their approval. I was satisfied being kept informed as to how the prosecution of La Star's application was proceeding, and never objected to any such course of action.

I conferred with the SJI Cellular members of the Management Committee only when a particular issue facing the venture required a joint effort to resolve. For example, when La Star was engaged in settlement negotiations with New Orleans CGSA, Inc. (NOCGSA), La Star needed to develop a settlement proposal to present to NOCGSA. Because of the wide variety of possible settlement options and the different perspectives of the two venturers, a telephone conference was held. At another time, it had been suggested by Mr. Belendiuk that modifications be made to the La Star Joint Venture Agreement. . . . USCC's counsel advised us that it would be in the best interest of USCC to acquiesce in the proposed modifications, and I did so on behalf of Star.

All participation by USCC in the activities of La Star was at the specific request of SJI Cellular or the Management Committee, either directly or through La Star's counsel, or independent engineering consultant. For example, at the time La Star was preparing its 1987 amendment, La Star asked USCC to assist in determining its capital costs and first year operating costs. This was done by Mark

**Krohse, an employee of USCC, under the direction of La Star's attorney and engineering consultant."**  
(Bold face portions omitted from ¶18 of the HDO are from La Star Exhibit No. 15)

19. A reading of Nelson's written testimony gives the appearance that the La Star Management Committee, which was under SJI's direction, was controlling the actions of La Star. Nelson's oral testimony, however, paints a different picture. For instance, under cross examination Nelson admitted that the Management Committee never formally voted on any matter and indeed never held telephone conferences:

MR. TOLLIN:<sup>32</sup> Was there ever an official vote taken, that you could remember, of the Management Committee?

MR. NELSON: By an "official vote," do you mean --

MR. TOLLIN: A vote. Do you ever remember a conference call in which all Management Committee members were present or a personal meeting in which there was a vote taken?

MR. NELSON: No.<sup>33</sup>

20. Furthermore, Nelson's testimony under cross examination conflicts with the statement in the written exhibit that the Management Committee directed Nelson's actions in La Star. The following exchange is illustrative:

MR. TOLLIN: Well, I'd like to know the basis for your statement that you were directed by the Management Committee, for instance. Why don't you give me an example of that?

MR. NELSON: I would get a call from Mr. Belendiuk<sup>34</sup> who would indicate that we were being requested to provide such information.

¶19 The HDO restates the thesis advanced in ¶18, and then attempts to show that Nelson's oral testimony "paints a different picture." It states that he "admitted" that the Management Committee never formally voted on any matter. That was hardly an "admission." He had not asserted or even suggested that there had been any votes, and his statement was completely consistent with his written testimony quoted above that the Management Committee had functioned informally, that his contacts with the SJI members had been rare, and that his primary contact had been Mr. Belendiuk.

The HDO is also wrong in construing Nelson's oral testimony as to the effect that the Management Committee never held a telephone conference. It was that he could not recall any in person meeting, or telephone conference, **in which a vote was taken**. There was one in person meeting, referred to in the Initial Decision at ¶55; there was also at least one telephone conference referred to in Nelson's direct case testimony (La Star Exhibit No. 15, pp. 3 - 4).

¶20 The HDO continues with the thesis that "Nelson's testimony under cross examination conflicts with the statement in the written exhibit that the Management Committee directed Nelson's actions in La Star." Again, that was not what he said in his written testimony. He said, "All participation by USCC in the activities of La Star was at the specific request of SJI Cellular or the Management Committee, **either directly or through La Star's counsel, or independent engineering consultant**." (emphasis added). His written testimony was also that "Generally, I would receive a telephone call from Mr. Belendiuk and he would advise me of a need for La Star to take some action." (La Star Exhibit No. 15, p. 3).

As to the Management Committee meetings, there has never been any dispute that "the Management Committee met only once

JUDGE CHACHKIN: Did you ever receive a specific request from SJI Cellular or the Management Committee?

MR. NELSON: I don't recall a specific.<sup>35</sup>

Moreover, the record shows that after USCC acquired its interest in La Star, the Management Committee only met once shortly after USCC's acquisition of Maxcell's interest.<sup>36</sup> The Management Committee never met as a whole in person or over the telephone again thereafter.<sup>37</sup>

21. Additionally, during recross examination, Nelson's testimony showed an even more limited role of the La Star Management Committee:

MR. TOLLIN: You said there was really no need for any Management Committee telephone conferences or actual meetings. Isn't it true during the period you owned the stock of STAR -- when I'm speaking of "owned" -- "you owned," I'm speaking of U.S. Cellular -- that there were decisions that had to be made about the contents of the October filing, decisions that had to be made with regard to the contents of your interim application, decisions that had to be made with regard to the appeal of the NOCGSA interim operating authority that was granted to it by the Commission after the La Star application was reinstated, and wasn't there really a need to have a full-blown Management Committee telephone conference call when you amended the agreement?

MR. MILLER:<sup>38</sup> Your Honor, I counted at least five questions there, and I don't know how the witness could possibly answer them.

shortly after USCC's acquisition of Maxcell's interest." Nelson's written testimony is not to the contrary.

The HDO (like the Initial Decision at ¶55) states that the Management Committee never met "as a whole in person or over the telephone again thereafter." Mr. Nelson's written testimony was that he participated in a telephone conference with SJI members of the Management Committee to discuss options for settlement with NOCGSA and that there was unanimous agreement on a settlement plan proposed by Mr. Crenshaw, a SJI member (La Star Exhibit No. 15, pp. 3 - 4). His oral testimony was that "I don't recall that they all were or some of them were" present during the call (Tr. 1447), and that by characterizing their agreement as "unanimous" he meant that "there was agreement on our side and there was agreement on their side, to me that means unanimity."

¶21 The HDO characterizes additional Nelson cross examination testimony as showing "an even more limited role of the La Star Management Committee" in that Nelson testified that there had been no need for meetings or telephone conferences to make decisions on the following matters:

The content of the October 1988 amendment to the La Star application "and the direction that you were going to go in;

The 1988 La Star application for interim operating authority;

Whether to appeal the Commission's grant of interim operating authority to NOCGSA;

The 1990 amendment to the La Star joint venture agreement; or

"what you were going to do with the expenses that you had been incurring . . . and how the expenses were going to be dealt with"

There had been no suggestion in Nelson's written testimony that there had been any Management Committee meetings to discuss these or any

JUDGE CHACHKIN: Well, we can go one by one.

MR. TOLLIN: Let's go one by one. Let's start with the October filing.

Were there not decisions that had to be made as to the contents of those filings and the direction that you were going to go in?

MR. NELSON: No.

MR. TOLLIN: No decisions? And how about any decisions with regard to the interim filing?

MR. NELSON: No.

MR. TOLLIN: No decisions with regard to whether to appeal the Commission's grant of interim operating authority to NOCGSA during the course of this proceeding?

MR. NELSON: No.

MR. TOLLIN: And no decision needed to be made as to amending the agreement?

MR. NELSON: No. My counsel had worked on that.

MR. TOLLIN: No decision needed to be made as to what you were going to do with the expenses that you had been incurring?

MR. NELSON: No.

MR. TOLLIN: And how the expenses were to be dealt with?

MR. NELSON: No.<sup>39</sup>

other any of the La Star filings with the Commission. Therefore, Nelson's testimony was internally consistent, and consistent with the facts. As to the 1990 amendment to the Joint Venture Agreement, his written testimony was also completely consistent, and was as follows:

"At another time, it had been suggested by Mr. Belendiuk that modifications be made to the La Star Joint Venture Agreement. Certain supermajority provisions, which I understand had never been invoked by Star and which USCC had no interest in invoking, were to be deleted, and Star's financial obligations to La Star were reduced so as to be proportionate to its forty-nine percent joint venture interest. USCC's counsel advised us that it would be in the best interest of USCC to acquiesce in the proposed modifications, and I did so on behalf of Star." (La Star Exhibit No. 15, p. 4).

22. USCC denies that Nelson's testimony misrepresented facts or lacked candor. Specifically, USCC disputes that Nelson's written testimony implies that Nelson was controlled by the Management Committee. Instead, claims USCC, Nelson, in his written statement, characterized his involvement in the La Star Management Committee as only agreeing to what La Star counsel, Arthur Belendiuk, had told him that SJI had proposed to do.<sup>40</sup> In this regard Nelson swore in his written statement:

My usual contact regarding La Star matters was La Star's counsel, Mr. Belendiuk. Generally, I would receive a telephone call from Mr. Belendiuk and he would advise me of a need for La Star to take some action. most of the calls involved a proposed course of action to be taken in the La Star litigation, e.g., the need to file an appeal. I understood that he had first spoken to someone at SJI Cellular and that the course of action had already been approved by SJI Cellular.<sup>41</sup>

Nelson stated further that:

In these circumstances, I did not believe that my approval was necessary, since three members of the Management Committee had already given their approval. I was satisfied being kept informed as to how the prosecution of La Star's application was proceeding, and never objected to any such course of action.<sup>42</sup>

USCC states that because Nelson would get his "marching orders" from La Star's counsel and not the Management Committee itself, there were no misrepresentations in Nelson's testimony.

23. However, Nelson became somewhat evasive when questioned about the basis of his statement that his vote was unnecessary because the SJI members had already approved of an action. The ALJ questioned Nelson as follows:

JUDGE CHACHKIN: What do you mean there, in the same paragraph -- now you've stated that the basis of your understanding is your belief that Mr. Belendiuk had spoken to someone from SJI.

¶22 Here the HDO notes USCC's contention that Nelson's testimony had been consistent, and quotes portions of his written testimony omitted from ¶18.

¶23 The HDO characterizes as "somewhat evasive" Nelson's testimony "when questioned about the basis of his statement that his vote was unnecessary because the SJI members had already approved of an action." To attempt to show the "evasive" nature of the testimony, it quotes from Nelson's examination by Judge Chachkin. That testimony is not at all evasive, and the HDO does not state the manner in which it can be so considered.

Then, you make the statement in the same paragraph, "I did not believe that my approval was necessary, since three members of the Management Committee had already given their approval."

Now, what's the basis for your belief that three members of the Management Committee had given their approval to this course of action, if your only discussion was with Mr. Belendiuk?

MR. NELSON: In our discussion our words would say, "Well, I have talked with the people in Louisiana," and they have three votes, we had two votes, it was their decision.

JUDGE CHACHKIN: Now, wait a minute. Did you -- why didn't you just convene in a formal or an informal meeting of the Management Committee and take up the matter, isn't that what the Management Committee was for?

MR. NELSON: As I've stated, they had three votes, we had two votes --

JUDGE CHACHKIN: There was no voting taken in this matter. You said all that happened was that you -- that Mr. Belendiuk indicated to you that he had spoken to someone -- someone, I say, at SJI Cellular.

Then, the next sentence you say, "Three members of the Management Committee." Now, what's the basis for your statement that three members of the Management Committee had given their approval?

There was no meeting of the Management Committee, informal or formal, so what is the basis for your statement?

MR. NELSON: The communications that Mr. Belendiuk had they had been -- this was the direction and this was the way they were recommending we go.

The colloquy does reveal that Nelson was unwilling to accept the predicates for Judge Chachkin's questions -- that Nelson had somehow testified that the Management Committee functioned formally, with meetings and votes; that there was a need to have meetings; that the three SJI members were independent of each other and did not speak with one voice; and that a consensus on how to proceed did not exist. These predicates were simply wrong, and Nelson had nothing about which to be "evasive." Nelson's oral testimony was entirely consistent with his written testimony, that he had got his instructions from Belendiuk.

The problems which Judge Chachkin, and later the Commission, appear to have had in grasping the role and significance of the Management Committee are central. Only a fixed perception, both erroneous and contrary to the record, that La Star had set up the Management Committee as a sham, and that USCC witnesses had then testified that it was an active, functional entity, could lead to the conclusion that their testimony was disingenuous. The written and oral testimony of the USCC witnesses was clearly consistent, and to the effect that during the application phase, the Management Committee was nothing more than a formal mechanism for SJI and USCC to resolve any differences which might arise. None arose, because by the time that USCC became involved, the path was clear and there was nothing over which to disagree. In the absence of such disagreement, USCC was willing to follow Belendiuk's lead and do whatever he said SJI (the entity which by virtue of its 51 percent ownership interest in La Star controlled the Management Committee and La Star) had requested.

JUDGE CHACHKIN: You were a member of the Management Committee, sir. There was no meeting held with the Management Committee on this matter, was there?

MR. NELSON: Which matter?

JUDGE CHACHKIN: The matter you are referring to in this paragraph concerning course of action to be taken with regard to La Star litigation, e.g., the need to file an appeal.

And then you state that you understand that Mr. Belendiuk had spoken to someone at SJI Cellular and the course of action had already been approved by Sji, and then you go on to say, "In these circumstances I did not believe my approval was necessary, since three members of the Management Committee had already given their approval."

Is it your testimony that Mr. Belendiuk told you that a vote had been taken by three members of the Management Committee and they had given their approval, is that your testimony?

MR. NELSON: No.

JUDGE CHACHKIN: In fact, there had not been a meeting of the Management Committee, had there?

MR. NELSON: (No response.)

JUDGE CHACHKIN: My question, sir, is: If there was a Management Committee, and the purpose of the Management Committee was to act on behalf of SJI, why, when you dealt with these matters, did you not convene a meeting of the Management Committee and take a vote on these matters?

MR. NELSON: When we discussed it I was in support of what the direction was.

JUDGE CHACHKIN: That is not my question, sir. My question is: There was a Management Committee, wasn't the Management Committee supposed to take up matters involving SJI, isn't that the purpose of it?

MR. NELSON: (No response.)

JUDGE CHACHKIN: What was the purpose of the Management Committee, if it wasn't to take up matters such as questions whether to appeal or note, what was the purpose of the Management Committee?

MR. NELSON: When it was developed it was to be the Management Committee as the operations of the market.

JUDGE CHACHKIN: Well, then, you're saying that the Management Committee was not of any function prior to the actual grant of the application, is that your testimony?

MR. NELSON: No.

JUDGE CHACHKIN: Well, you just said so. You said it was --

MR. NELSON: No.

JUDGE CHACHKIN: -- developed for the purpose of taking care of the cellular system after it was in the market.

Now, I'm asking you, what was the purpose of the Management Committee prior to the grant of an application?

MR. NELSON: There had been time that had gone one, Your Honor.

JUDGE CHACHKIN: Pardon me?



MR. NELSON: There had been quite a bit of time that had gone on, and the original approach of the Management Committee was to build and manage the market. In the intervening activity, these legal activities had occurred, and we were handling the business via telephone.

JUDGE CHACHKIN: My question is, sir: As I am aware of it there was only one informal conference call between the members of the Management Committee. Now, what was the purpose of the Management Committee prior to the time of a grant, did it have any purpose?

MR. NELSON: Yes.

JUDGE CHACHKIN: What was its purpose?

MR. NELSON: To agree on the course of the action for the obtaining of the construction permit.

JUDGE CHACHKIN: Could you tell me why you didn't -- a Management Committee meeting was not convened to determine whether or not you should take an appeal? Did you consider the question of taking an appeal an important action of La Star?

MR. NELSON: If your question is within United States Cellular --

JUDGE CHACHKIN: No, I'm talking about as far as La Star venture is concerned. Was the question of whether you would take an appeal from the Commission's decision, did you consider it to be an important matter?

MR. NELSON: Yes.

JUDGE CHACHKIN: Why wasn't a Management Committee meeting convened on that?

MR. NELSON: We were all in support of the same direction.

JUDGE CHACHKIN: The question is: Why wasn't a Management Committee meeting convened, since that was the purpose of the Management Committee, at which a vote was taken?

MR. NELSON: I don't know, sir.

JUDGE CHACHKIN: So, you have no basis, in fact, for stating that three members of the Management Committee had already given their approval, since you had not discussed this matter with any members of the Management Committee, is that correct?

MR. NELSON: I had not discussed it with the Management Committee, but I had that information from Mr. Belendiuk.

JUDGE CHACHKIN: Mr. Belendiuk told you a meeting of the Management Committee had been held, in which three had voted for this proposition, is that your testimony?

MR. MILLER: Excuse me, Your Honor, that's not his testimony. He does not say that there was a meeting, he said that there were three members of the Management Committee who had --

JUDGE CHACHKIN: Who had already given their approval. Now, did Mr. Belendiuk tell you that three members of the Management Committee had already given their approval?

MR. NELSON: Yes.

JUDGE CHACHKIN: He told that in those words?

MR. NELSON: That's what I recall.

JUDGE CHACHKIN: Did he say what -- when they had given their approval and what manner they given their approval?

MR. NELSON: No, not that I recall.<sup>43</sup>

24. La Star counsel, Mr. Belendiuk, states his involvement in a slightly different manner. Prior to the calling of any witnesses, there was a discussion on the record of whether Mr. Belendiuk would need to be called as a witness. Mr. Belendiuk characterized his involvement as follows:

MR. BELENDIUK: . . . I -- I've not made any -- I have not made a single decision for La Star other than very minor ones such as requesting motions for extension of time and such like that.

Each significant decision that has -- that has had to be made or any decision as to whether to continue litigation or to file a motion to enlarge or anything along those lines has always been made by consultation with at least one of the principals of the Management Committee.<sup>44</sup>

25. The ALJ upon examining the record, however, stated about Belendiuk's participation that "there is no record evidence of a Management Committee meeting delegating any authority to Belendiuk."<sup>45</sup> The ALJ stated further that "there is no evidence in the record which even suggests that SJI was orchestrating and overseeing counsel's activities, or, for that matter, was even aware of the many activities engaged in by USCC and its employees on behalf of La Star."<sup>46</sup> The ALJ concluded that:

the evidence suggests that counsel was, throughout the relevant period, more the agent of the ineligible partner, than the agent of SJI. La Star might have a more stronger [sic] agency argument if it had chosen counsel used by SJI for other cellular matters. In sum, it does not follow from the fact that Belendiuk is La Star's counsel that he is SJI's agent or that his actions can be attributed thereto.<sup>47</sup>

¶24 Contrary to the HDO, Mr. Belendiuk's brief statement as to his role in the litigation is consistent with Nelson's testimony that his usual contact was with Mr. Belendiuk, and that "I understood that he had first spoken to someone at SJI Cellular and that the course of action had already been approved by SJI Cellular." (La Star Exhibit No. 15, p. 3).

¶25 Mr. Belendiuk's statement, cited in ¶24, was that he did nothing of significance without consultation with at least one member of the Management Committee. That is not at odds with Judge Chachkin's finding that "there is no record evidence of a Management Committee meeting delegating any authority to Belendiuk." Judge Chachkin's finding that

"there is no evidence in the record which even suggests that SJI was orchestrating and overseeing counsel's activities, or, for that matter, was even aware of the many activities engaged in by USCC and its employees on behalf of La Star"

is plainly wrong. There is substantial evidence to that effect. First, there is Nelson's testimony that when Belendiuk called him, Nelson understood Belendiuk first to have communicated with "someone at SJI Cellular and that the course of action had already been approved by SJI

Cellular." (La Star Exhibit No. 15, p. 3). There is no evidence inconsistent with this testimony. Second, Mr. John Brady testified:

"The greatest number of decisions that La Star has had to make have involved the course of action and direction of the litigation. Usually, I or Sinclair H. Crenshaw, an employee of SJI and a member of the Management Committee, receive a telephone call from Mr. Belendiuk. We discuss a particular course of action to follow and then I or Mr. Crenshaw instruct Mr. Belendiuk on how to proceed. Mr. Belendiuk then usually calls someone at USCC, Star's parent company, and advises them of the course of action to be taken. If there is no disagreement (and there has never been any, to my knowledge), there is no need for a meeting between SJI Cellular and Star. In each and every instance that I, or any member of the Management Committee representing SJI Cellular, has instructed Mr. Belendiuk to take a particular course of action, Mr. Belendiuk has proceeded as specifically instructed. No action has been taken by La Star, either directly or indirectly through its counsel or consulting engineer, at any time, that I was not aware of and that I did not approve in advance." (La Star Exhibit No. 12, p. 6).

Judge Chachkin's erroneous statement that "there is no evidence in the record which even suggests" these things does not mean that the evidence is not in fact in the record. Nor, even if Mr. Brady's testimony were in some respect erroneous, is there any basis for concluding that Mr. Nelson's testimony that he understood there to have been such discussions was less than candid.

26. We affirmed this finding of the administrative law judge. We reached the conclusion that:

[SJI claims that it] unilaterally controlled La Star by means of instructions to USCC that were conveyed to USCC by attorney Belendiuk. The record does not, however, support this claim. . . . La Star fails to cite any evidence -- beyond generalized, self-serving claims --

¶26 Even if Judge Chachkin's erroneous conclusion, with which the FCC inexplicably agreed, to the effect that Belendiuk was more the agent of USCC than of SJI, were correct, it would not contradict Nelson's written testimony that he relied on Belendiuk's statements that he had first conferred with SJI, and that he followed Belendiuk's instructions for that reason. There is no evidence whatever that Nelson ever told Belendiuk what to do, or that USCC ever did anything on behalf of La Star without first being asked to do it by Belendiuk.

to support the contention that SJI supervised Belendiuk. Rather, the documentary evidence and the specific testimony of the witnesses describes circumstances in which, to all appearance, Belendiuk was USCC's attorney and USCC supervised the prosecution of the application.<sup>48</sup>

Therefore, record evidence contradicts Nelson's written direct testimony that he relied on what Belendiuk had told him with regard to courses of action that had already been approved by SJI Cellular through the Management Committee.<sup>49</sup>

27. We have examined the allegations against USCC in light of the standards for designating a hearing issue. See Astroline Communications Limited Partnership v. FCC, 857 F.2d 1556, 1561-62 (D.C. Cir. 1988); 47 U.S.C. §§ 309d, 30(e). When we examine the record we find that there is a substantial and material question of fact as to whether Nelson engaged in misrepresentation and was not fully forthright and candid in his testimony about the Management Committee.

28. As shown above, Nelson's written testimony refers to the control exercised by the La Star Management Committee. For instance Nelson's direct case exhibit states that he had "always acted on the belief that La Star's Management Committee is controlled by the three members appointed by SJI Cellular. [And that he was] not aware of a single instance where that had not been the case."<sup>50</sup> But also as shown above, the Management Committee served little purpose. From the time that USCC acquired its interest in La Star, the Management Committee only met once. The Management Committee did not discuss the October 1987 amendment filed by USCC to La Star's application, did not discuss the application for interim operation, did not discuss whether to appeal the grant of interim authority to NOCGSA, did not discuss the amendments made to the Joint Venture Agreement, and did not discuss the expenses being incurred by USCC.<sup>51</sup> Nonetheless, Nelson's written testimony make several references to the control exercised by the Management Committee over La Star's operations, and Nelson told the ALJ that the Management Committee's purpose was "[t]o agree on the course of the action for obtaining a construction permit."<sup>52</sup>

27 *Astroline* deals with the circumstances under which disputed substantial and material issues of fact require a hearing. Here, there is no question as to what Nelson (or any other USCC employee) said, in written or oral testimony. The only question (beyond whether USCC was in control of La Star, a matter now before the Court of Appeals) is one of interpretation. As shown here, the strained interpretation given the testimony by the HDO is not consistent with the record.

¶28 The HDO thesis that "the Management Committee served little purpose" is correct, in the sense that by the time that USCC became involved with La Star, a course of action had already been established, and so long as USCC and SJI remained in agreement that La Star should continue on that course, there was no need for the Management Committee to meet. As John Brady testified,

"To date, La Star's Management Committee has functioned on an informal basis. La Star currently does not have a formal operating system. There are no day-to-day decisions that need to be made. There have been years in which La Star did little more than wait for a decision or action from either the Court of Appeals or the Federal Communications Commission. La Star has no facilities to manage, repair or replace. La Star is a shell waiting to receive authorization to commence operations. Formal meetings have not been held, because there is nothing for La Star to decide at such meetings." (La Star Exhibit No. 12, p. 5).

The Management Committee did provide a vehicle for resolution of any disputes which might arise, but as John Brady testified, "if there is no disagreement (and there has never been any, to my knowledge), there is no need for a meeting between SJI Cellular and Star." (La Star Exhibit No. 12, p. 6).

Nelson's testimony that the purpose of the Management Committee was "to agree on the course of the action for obtaining of the construction permit" was correct, and that agreement existed.

29. Moreover, Nelson's written testimony that he would confer with SJI "when a particular issue facing the venture required a joint effort to resolve" and citing an example of such an instance,<sup>53</sup> gives the distinct impression that Nelson had conferred with the SJI members of the Management Committee more than once.

¶29 Nelson's written testimony was that he "conferred with the SJI Cellular members of the Management Committee **only** when a particular issue facing the venture required a joint effort to resolve." (La Star Exhibit No. 15, p. 3 (emphasis added)). The HDO quotation from Nelson's written testimony leaves out the important word "only," an omission which obviously changes the meaning of the sentence.

Nelson did confer "more than once" with the SJI members of the Management Committee. He conferred with them at the Chicago meeting in 1987 (*Initial Decision*, ¶155), and he again conferred with at least some of them during a conference call on options for settlement with NOCGSA (La Star Exhibit No. 15, pp. 3 - 4). There is no suggestion in his written or oral testimony falsely suggesting that he conferred more frequently with them, and his written testimony was clear that he did so "only" when a particular issue facing the venture required a joint effort to resolve, which as he testified was unusual.

30. Based on the above, we believe a question exists as to whether Nelson was fully candid and truthful on the functioning of the Management Committee. Nelson's testimony does not disclose that the Management Committee only met once and that there were never any votes taken. Accordingly, we believe a question exists as to whether Nelson was attempting to mislead the Commission as to the functions of the Management Committee.

¶30 Nelson stated in his direct testimony that the Management Committee "functioned on an informal basis," that his primary contact was with Belendiuk, that he understood that Belendiuk had "first spoken to someone at SJI Cellular and that the course of action had already been approved by SJI Cellular," and that he did not believe that his approval was needed (La Star Exhibit No. 15, pp. 3 - 4). He did not claim in his direct testimony that the Management Committee had met more than once; indeed, he did not even claim that it had met at all. Nor did he claim, or suggest, that any votes were ever taken. His written testimony concerning the functions of the Management Committee was entirely truthful.

31. USCC's explanation of Nelson's testimony does not suffice to resolve the question. We do not agree with USCC's claims that Nelson's testimony only stands for the proposition that Nelson received all of his "marching orders" from Mr. Belendiuk. This evidence weighed against Belendiuk's exchange on the record raises a material and substantial question of fact as to Nelson's veracity. For instance, Mr. Belendiuk stated that he always consulted "with at least one of the principals of the Management Committee."<sup>54</sup> This calls into question Nelson's testimony that Mr. Belendiuk always spoke to the three SJI members before consulting with Nelson at USCC.<sup>55</sup>

32. Therefore, we believe that a substantial and material question of fact exists as to whether Nelson's testimony about his dealings with La Star counsel, Mr. Belendiuk, was fully candid or truthful. There does not appear to be any record evidence to support Nelson's understanding that Belendiuk had obtained prior approval from SJI Management Committee members. Whereas Nelson testified that Belendiuk told him that he (Belendiuk) obtained the votes of the SJI members before calling him (Nelson), if Nelson was aware that Mr. Belendiuk did not always speak with the three SJI Management Committee members, his testimony is untruthful. There is contradictory evidence in the record on this matter. Nelson's testimony itself is contradictory; on the one hand, Nelson stated that Mr. Belendiuk did not tell him (Nelson) that a vote had been taken of the SJI members on any issue.<sup>56</sup> In the same colloquy, however, he stated that Mr. Belendiuk had told him that the three SJI members voted on whatever issue was at hand.<sup>57</sup> This latter testimony cannot be

¶31 There is no inconsistency between Belendiuk's statement on the record that he always consulted "with at least one of the principals of the Management Committee" and the testimony attributed to Nelson that Belendiuk "always spoke to the three SJI members before consulting with Nelson at USCC" (emphasis added). Nor did Nelson so testify. Nelson's written testimony was that he understood that Belendiuk had "first spoken to someone at SJI Cellular and that the course of action had already been approved by SJI Cellular" (La Star Exhibit No. 15, p. 3, emphasis added). There is no suggestion in Nelson's direct testimony that Belendiuk "always" spoke to all three SJI members first, or even that he ever did so.

The citation provided by the HDO in attempted support for the proposition that Nelson testified that Belendiuk "always spoke to the three SJI members before consulting with Nelson at USCC" (emphasis added) provides no support at all. Judge Chachkin's question concerned only one specific instance, involving La Star's appeal from grant of interim operating authority to NOCGSA. Nelson testified that he recalled being told on that single occasion by Belendiuk that all three SJI members of the Management Committee had given their approval (Tr. 1384 - 1386). There is no Nelson testimony even suggesting that this was a consistent practice, or that it happened more than once.

¶32 This appears to be based on the same notion, that Nelson testified that Belendiuk told him that he always "obtained the votes of the SJI members before calling him (Nelson)." Again, there is no suggestion in Nelson's testimony that Belendiuk told him (except on the one occasion noted above) that "all three members of the Management Committee had given their approval." Nor did Nelson testify that "Mr. Belendiuk had told him that the three SJI members voted on whatever issue was at hand." The portion of the transcript relied on by the HDO for this assertion is as follows:

JUDGE CHACHKIN: So, you have no basis, in fact, for stating that three members of the management committee had already given their approval, since you had not discussed this matter with any members of the management committee, is that correct?

reconciled with Mr. Belendiuk's statement that he always spoke with at least one member of the Management Committee.

MR. NELSON: I had not discussed it with the management committee, but I had that information from Mr. Belendiuk.

JUDGE CHACHKIN: Mr. Belendiuk told you a meeting of the management committee had been held, in which three had voted for this proposition, is that your testimony?

MR. MILLER: Excuse me, Your Honor, that's not his testimony. He does not say that there was a meeting, he said that there were three members of the management committee who had - - -

JUDGE CHACHKIN: Who had already given their approval. Now, did Mr. Belendiuk tell you that three members of the management committee had already given their approval?

MR. NELSON: Yes.

JUDGE CHACHKIN: He told you that in those words?

MR. NELSON: That's what I recall.

JUDGE CHACHKIN: Did he say what -- when they had given their approval and what manner they had given their approval?

MR. NELSON: No, not that I recall. (Tr. 1385 - 1386)

Nelson's testimony was not that "Belendiuk had told him that the three SJI members **voted**" (emphasis added) on even the one matter there at issue, the appeal from grant of interim operating authority to NOCGSA. Rather, it was that Nelson did not know when or in what manner they had given their approval. Nor was Nelson's testimony that votes were ever, much less always, taken among the SJI members with respect to "whatever issue was at hand."



33. There are apparent contradictions in the record itself. We therefore cannot resolve the issue of whether Nelson's testimony was fully truthful and candid. We believe that a substantial and material question of fact exists as to USCC's character in the La Star proceeding. Nelson and USCC had every incentives to suggest that USCC was not in control; thus, there is a strong reason to believe that any inconsistencies and misstatements by Nelson were intentional. If USCC misrepresented facts or lacked candor, this calls into questions USCC's, and its parent TDS's, qualifications to be Commission licensees. Accordingly appropriate issues are designated here. Furthermore, because we have determined that a substantial and material question of fact exists whether TDS is qualified to be a Commission licensee, we are setting aside the grant issued to TDS in the Wisconsin 8 RSA. We note that TDS has commenced serviced in this market, and to preserve continuity of this service, we will allow TDS to continue operating on an interim basis.<sup>58</sup> See LaStar Cellular Telephone Co., 4 FCC Rcd 3777 (1989), aff'd sub nom., La Star Cellular Telephone Co. v. FCC, 899 F.2d 1233 (D.C. Cir. 1990); 47 C.F.R. 22.32(g).

¶33 The "incentive" for Nelson and USCC to suggest that USCC was not in control was that USCC was not in control. As shown in detail above, there were none of the "inconsistencies and misstatements by Nelson" alluded to by the HDO.

30. See La Star Ex. 15, p. 2.

31. See id., at pp. 3-4.

32. L. Andrew Tollin was counsel representing NOCGSA in the La Star proceeding.

33. Tr. at 1443 (footnote added).

34. Arthur V. Belendiuk was counsel representing La Star in the La Star proceeding.

35. Tr. at 1448-49 (footnote added).

36. La Star Ex. 12, p. 7.